Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SOFIA COLLADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. An owner's "willful blindness" to drug activity is not a basis for forfeiture of real property under 21 U.S.C. § 881(a)(7). In contrast, under 21 U.S.C. § 881(a)(4), "willful blindness" is a basis for forfeiture of conveyances used to facilitate drug trafficking. Notwithstanding, the Second Circuit applied a non-statutory "willful blindness" test in upholding the forfeiture of Petitioner Sofia Collado's real property.

May a federal court apply a "willful blindness" test to an innocent-owner defense under 21 U.S.C. § 881(a)(7)?

2. The Second Circuit required the Government to show mere probable cause that the property was used to facilitate drug activity. In contrast, it required Mrs. Collado to prove by a preponderance of the evidence her lack of knowledge, consent, and willful blindness concerning this use. Mrs. Collado never had the benefit of an evidentiary hearing, even though the Government submitted no evidence that she had actual knowledge.

Does the application of disparate burdens of proof to the Government and the claimant in a civil forfeiture action under 21 U.S.C. § 881(a)(7), without any evidentiary hearing for the claimant, offend the Due Process Clause of the Fifth Amendment?

LIST OF PARTIES

1) Sofia Collado was the claimant-appellant below and is the petitioner in this Court.

2) The United States of America was the plaintiff-appellee below and is the respondent in this Court.

3) The subject property, a defendant in the proceedings below, is the Real Property and Premises known as 464 Myrtle Avenue and 181 Washington Avenue, Brooklyn, New York.

4) Other property named as defendants below, but not the subject of the proceedings before the District Court or the United States Court of Appeals for the Second Circuit, and therefore not joining in this petition for certiorari: A 1995 Toyota Land Cruiser, New York License Plate Number K560GF, VIN # JT3DJ81W3S0108524, United States Currency in the Amount of $8,686.00, more or less, seized at 464 Myrtle Avenue, and 181 Washington Avenue, Brooklyn, New York on June 3, 1998, United States Currency in the amount of $19,266.00, more or less, seized at 464 Myrtle Avenue and 181 Washington Avenue, Brooklyn, New York on June 3, 1998, United States Currency in the amount of $8,909.05, more or less, seized at 295 Washington Avenue, Apartment 4D, Brooklyn, New York on June 3, 1998, United States Currency in the amount of $5,000.00 more or less, seized on June 3, 1998 from safety deposit box number 631 maintained in the name of Ana Olga Collado at Citibank, 430 Myrtle Avenue, Brooklyn, New York, all funds on deposit in Chase Manhattan Bank Account Number 819-6021835-01 in the name of Angela Lorenzo, all funds on deposit in Chase Manhattan Bank Account Number 053-0674666-65 in the

name of Ana O. Collado and Rafael R. Collado, all funds on deposit in Chase Manhattan Bank Account Number 053-0674666-01 in the name of Ana O. Collado and Rafael R. Collado., and all proceeds traceable thereto.

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Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided November 6, 2003 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated March 19, 2003 ... 12a

Sofia Collado petitions for a writ of certiorari to issue to review the decision of a panel of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit for which Petitioner seeks the Court's review is reported at 348 F.3d 323 (2d Cir. 2003) and reprinted as Appendix A hereto ("App. A"). That opinion affirms a memorandum and order of the United States District Court for the Eastern District of New York granting summary judgment to the Government, reported at 2003 U.S. Dist. LEXIS 6505 and 2003 WL 21056786, but not in F. Supp. 2d, and reprinted as Appendix B hereto ("App. B").

BASIS OF JURISDICTION

The judgment of the Court of Appeals of the Second Circuit for which this Court's review is sought was entered on November 6, 2003. On December 31, 2003, the Second Circuit ordered a stay of its mandate.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

21 U.S.C. § 881(a):

Forfeitures

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that —

* * *

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

* * *

(7) All real property, including any right, title, and interest (including any leasehold interest) in whole of any lot or tract of land and any

> appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

A. Nature Of The Case

The Second Circuit affirmed summary judgment granting civil forfeiture of a building the sixty-four-year-old petitioner, Sofia Collado ("Mrs. Collado"), purchased in 1983 with her late husband, who passed away during the Government's prosecution of this case. The Government has never claimed that the purchase of the property was financed with the proceeds of narcotics trafficking or any other illegal activity. Since 1983, Mrs. Collado had operated her grocery store on the ground floor (with a basement storage area), and rented two apartments, one each on the second and third floors, accessible by a separate common entrance around the corner. Mrs. Collado did not occupy either apartment during the events in question. The forfeiture was based upon the drug dealing of Mrs. Collado's son, Rafael Collado Jr. ("Rafael"), and his associates.

The Comprehensive Forfeiture Act of 1984, § 306, Pub. L. 98-473, 98 Stat. 1837, 2050 (1984), provides an "innocent owner" defense, precluding civil forfeiture "by reason of any

act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7). In contrast, § 881(a)(4), enacted four years later, allows conveyances associated with drug trafficking, such as aircraft and vessels, to be forfeited based upon the "knowledge, consent, or willful blindness" of the owner. 21 U.S.C. § 881(a)(4). The lower courts ruled, however, that, in order to meet the innocent-owner defense under 21 U.S.C. § 881(a)(7) and keep her real property, Mrs. Collado must prove, by a preponderance of the evidence, that she was not willfully blind to her son's illegal activities. Mrs. Collado was not given an evidentiary hearing.

B. Course Of Proceedings And Disposition In The Courts Below

1. The State Criminal Investigation and Proceedings

Between March 1997 and June 1998, the New York City Police Department ("NYPD") conducted an investigation of Rafael Collado and his associates' narcotics activity. As part of this investigation, the NYPD intercepted some 6,714 telephone calls. The NYPD alleged that 646 of these calls were related to narcotics transactions. The Government alleges that five of these 646 calls demonstrate Mrs. Collado's "willful blindness." *See* Joint Appendix ("JA")[1] 54-55; 63-65; 75-92; 119-122; 125. The Government submitted no evidence that Mrs. Collado acted as a money or drug courier or conduit in service of Rafael's operation, or that Mrs. Collado received proceeds from her son's drug sales. Although Mrs. Collado worked at the store every day, the

1. This refers to the record of the case submitted to the Second Circuit as a joint appendix.

Government concedes there is no evidence that she either witnessed any drug transactions or saw drugs or drug paraphernalia at or in the vicinity of the defendant property. Rafael concealed his illicit activity from his mother by conducting his transactions off the subject premises and using English and coded drug slang with his associates. JA 180-191; 230-238.

The investigation led to the arrests of Rafael and his associates. On September 23, 1999, Rafael pleaded guilty to one count of criminal sale of a controlled substance in the second degree and was subsequently sentenced to a prison term of ten years to life. JA 70; 153. Because of Rafael's plea, the volume and scope of Rafael's narcotics trafficking has never been adjudicated at an evidentiary hearing. Although Rafael maintained a "stash house" miles away as a location for receipt and storage of narcotics, the Government estimated that Rafael and his associates distributed approximately $10 million in narcotics from the defendant property between June 1997 and June 1998. JA 71-72; 162-163.[2] Mrs. Collado herself has never pleaded guilty to or been convicted of any crime in connection with Rafael's narcotics trafficking; although she was arrested in the 1998 raid, the charges were dismissed for failure to prosecute. JA 174-75.

2. The Proceedings in the District Court

The United States commenced this action on June 8, 1998. On June 9, 1998, the District Court issued a supplemental warrant for forfeiture of the property. On May 27, 1999, Mrs. Collado filed a claim for the defendant property. In May 2001,

2. The Second Circuit put this figure at $20 million, repeating an erroneous computation in the District Court proceedings. App. A 4a, 9a; JA 327.

the Government moved for summary judgment. The District Court granted the motion on March 26, 2003. App. B.

The District Court ruled that:

> Even excluding the events that occurred wholly in the vicinity of the apartment entrance (and therefore were likely invisible to Mrs. Collado since she could only see what transpired in the store and just outside its entrance) the Government can point to eleven events over the course of one year that Mrs. Collado more likely than not saw or overheard.

App. B 14a. The Second Circuit noted: "The district court below appears to have predicated its ruling regarding Collado's willful blindness, in part, upon its finding that she had 'more likely than not' witnessed certain narcotics-related events in and around her store. To the extent that this was the case, we disagree with the court's analysis." App. A 8a-9a.

The District Court's opinion discusses four phone calls Mrs. Collado received and one that she initiated. In light of the Second Circuit's holding, these phone calls are the only purported evidence of Mrs. Collado's willful blindness. In her opposition to the Government's motion, Mrs. Collado disputed both the meaning of her statements during these phone calls and whether these statements proved she knew her son was engaged in drug trafficking at the defendant property. This evidence, and the estimated volume of Rafael's transactions, were the Government's purported bases for demonstrating that Mrs. Collado was not an innocent owner.

Notwithstanding Mrs. Collado's dispute of the phone calls allegedly showing that she was willfully blind, the District Court granted summary judgment.

3. The Second Circuit's Decision

On November 6, 2003, the Second Circuit, in a *per curiam* opinion, affirmed the District Court's grant of summary judgment forfeiting the property. With respect to the District Court's permitting forfeiture based on Mrs. Collado's "willful blindness" to her son's illicit activity, the Second Circuit wrote: "We have construed the 'knowledge' prong broadly such that 'where an owner has engaged in 'willful blindness' as to the activities occurring on her property, her ignorance will not entitle her to avoid forfeiture.'" App. A 8a (quoting *United States v. 755 Forest Road*, 985 F.2d 70, 72 (2d Cir. 1993)). As noted above, however, the Second Circuit overruled the District Court's "willful blindness" finding that Mrs. Collado had 'more likely than not' witnessed certain narcotics-related events in and around her store." App. A 8a-9a. Nonetheless, the Second Circuit found sufficient evidence in the record to support summary judgment and affirmed. App. A 9a.

The Second Circuit also rejected Mrs. Collado's argument that her rights under the Due Process Clause of the Fifth Amendment were violated when the District Court allowed her property to be forfeited upon a mere showing of probable cause while requiring her to prove her lack of knowledge or willful blindness by a preponderance of the evidence, without benefit of an evidentiary hearing. The Second Circuit based this holding on its recent decision in *United States v. Parcel of Property*, 337 F.3d 225 (2d Cir. 2003).

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Resolve The Conflict Between The Construction And Application Of Section 881(a)(7) And The Unambiguous Text Of The Statute.

In 1984, Congress amended 21 U.S.C. § 881 to authorize the forfeiture of real property used to facilitate narcotics trafficking, "except that no [real] property shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the *knowledge or consent* of that owner." Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 (1984) (codified at 21 U.S.C. § 881(a)(7)) (emphasis added).[3] This "innocent owner" defense affirms the principle that the civil forfeiture statutes "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *United States v. United States Coin and Currency*, 401 U.S. 715, 721-22 (1971).

Four years later, Congress added subsection (c) to 21 U.S.C. § 881(a)(4), which covers forfeiture of aircraft, vessels, and the like, in order to provide another "innocent owner defense." The 1988 amendment to § 881(a)(4) provides that "no conveyance shall be forfeited . . . by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, *or willful blindness* of the owner." Asset Forfeiture Amendments Act of 1988, Pub. L. No. 100-690, § 6075, 100 Stat. 4181,

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3. Section 881(a)(6), which governs the civil forfeiture of money and negotiable instruments, contains identical language.

4324 (1988) (emphasis added). As conveyances can be easily removed from federal jurisdiction, unlike real property that is fixed, Congress's creation of a more stringent standard to establish innocent ownership in this different context is understandable.

But, by not adding the "willful blindness" language to § 881(a)(7) when it amended § 881(a)(4), Congress manifested its intent to permit forfeiture of real property only when the owner knows of or consents to illegal use of the property: "'[W]here Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Rusello v. United States*, 464 U.S. 16, 23 (1983)).

Further, Congress's inclusion of "willful blindness" alongside "knowledge" in § 881(a)(4) established that the two phrases have different meanings, contrary to the Second Circuit's view that willful blindness is equivalent to knowledge. Indeed, if the two terms were equivalent, the Second Circuit would have had no reason to read "willful blindness" into the statute. In short, the Court's construction of the statute makes the reference to "knowledge" in § 881(a)(4) redundant. This contravenes the well-settled canon of statutory interpretation that statutes should not be interpreted in a way that renders their language redundant. *See, e.g., United States v. Alaska*, 521 U.S. 1, 59 (1997); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574-75 (1995).

The plain meaning of the statute's text also demonstrates that "knowledge" is not synonymous with either "willful blindness" or suspicion. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1971) defines "knowledge" as:

> [A]cknowledgment . . . cognizance . . . the fact or condition of knowing . . . the fact or condition of knowing something with a considerable degree of familiarity gained through experience or contact or association with the individual or thing so known . . . the fact or condition of being cognizant, conscious, or aware of something . . . the fact or condition of apprehending truth, fact or reality immediately with the mind or senses: perception, cognition. . . .

This accepted definition of "knowledge" requires that, under 21 U.S.C. § 881(a)(7), Mrs. Collado must have been actually aware or cognizant of her son's criminal activities on, and in the vicinity of, the subject property for that property to be subject to forfeiture. The Government concedes this is not the case. As a result, its sole recourse was to argue that Mrs. Collado was "willfully blind."

Here, the statute provides that Mrs. Collado's property is only subject to forfeiture if she had knowledge of or consented to the illegal activity on the property. But instead of applying the statute's "knowledge or consent" test, both the District Court and the Second Circuit have required Mrs. Collado to prove that she was not willfully blind, contrary to the statutory language. "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1871), *cited with approval in Christensen v. Harris County*, 529 U.S. 576, 583 (2000).

In sum, by determining that the phrase "willful blindness" is implicit in § 881(a)(7), the Second Circuit, and other courts of appeals, have rewritten the statute and substituted their own judgment for that of Congress. Like the court below, the Ninth and Tenth Circuits have changed the statute's plain language by expressly reading "willful blindness" into the text of § 881(a)(7). *See United States v. 16328 S. 43rd E. Ave.*, 275 F.3d 1281 (10th Cir. 2002); *United States v. 2659 Roundhill Dr.*, 194 F.3d 1020 (9th Cir. 1999). Accordingly, there is a substantial question for the Supreme Court to resolve by determining whether the innocent-owner defense under § 881(a)(7) requires an owner who lacks knowledge of, or did not consent to, the illegal activity to also prove that she was not "willfully blind" to the illegal use of the subject property.

II. Review Is Warranted To Clarify The Due-Process Rights Of Owners Whose Property Is Summarily Forfeited By The Burdens Of Proof Under 21 U.S.C. § 881(a)(7).

Mrs. Collado's property was forfeited under a statutory scheme that deprived her of procedural due process under the Fifth Amendment. Under § 881, seizure of real property is permitted upon the Government's showing of probable cause that it was used to facilitate drug activity. 21 U.S.C. § 881(b)(4).[4] When a claimant, such as Mrs. Collado, challenges the seizure, she must prove by a preponderance of evidence either that the property was not used for illicit activity or that she had no knowledge of or did not consent to such use. 19 U.S.C. § 1615; 21 U.S.C. §§ 881(a)(7), 881(d).

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4. The Civil Asset Forfeiture Reform Act of 2000, Pub. L. 106-185, 114 Stat. 202 (2000) modified the burden of proof in civil forfeiture cases, but it applies only to actions commenced on or after August 23, 2000. *Id.* § 21, 114 Stat. at 225.

Here, the disputed material fact of Mrs. Collado's lack of knowledge that her property was being used to facilitate drug activity should have sufficed to defeat summary judgment, or provide her with an evidentiary hearing. Instead, Mrs. Collado was also forced to meet the "willful blindness" heightened standard of proof — which is not required by Congress — without an evidentiary hearing. See discussion, *supra*. The typical indicia that might suggest "willful blindness" — the presence of drugs on the property in plain view, or acting as a courier, but not looking in the packages, for example — are absent from the Government's case. Mrs. Collado sought to prove that she was an innocent owner, but she was deprived of any meaningful hearing to present her case.

The Second Circuit rejected this argument, following the precedent of *Parcel of Property*:

> While allocating the burden of proof to the claimant will undoubtably affect the outcome of some forfeiture cases, it does not deprive the claimant of due process. We therefore hold that the pre-CAFRA burdens of proof do not violate due process. We join the only two other circuits to have addressed this issue post-*Austin* and *Good*. See [*United States v.*] *$129,727.00 U.S. Currency*, 129 F.3d [486,] 494 [9th Cir. 1997]; *United States v. One Beechcraft King Air 300 Aircraft*, 107 F.3d 829, 830 (11th Cir.1997) (per curiam).

337 F.3d at 233.

The cases relied upon in *Parcel of Property* did not deal with actions for forfeiture of real property under 21 U.S.C. § 881(a)(7) and, therefore, do not support its holding. *$129,727.00 U.S. Currency* addressed a forfeiture of money under § 881(a)(6) and *Beechcraft* was an action for forfeiture of an aircraft under § 881(a)(4). Mrs. Collado's interest in her business and livelihood, which depend on the subject property, is higher than that held by owners of currency or vehicles. This Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), mandates a higher level of Constitutional scrutiny for governmental actions involving the seizure of real property than that applied to the seizure of personal property:

> The seizure of a home produces a far greater deprivation than the loss of [personal property], or even attachment. It gives the Government not only the right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supersede the owner in all rights pertaining to the use, possession, and enjoyment of the property. . . . The rent represents a significant portion of the exploitable economic value. . . . It cannot be classified as *de minimis* for purposes of procedural due process. . . .

Id. at 54.

Good holds that, absent exigent circumstances, "the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* at 62. In *Good*, this Court left open the broader and more significant question of

whether the Due Process Clause requires the Government to meet a greater burden than mere probable cause to justify a forfeiture before the burden shifts, i.e., before the claimant is required to prove by a preponderance of the evidence that she is an innocent owner. In dicta, the Second Circuit has already expressed its doubts about whether allowing forfeiture of real property based upon mere probable cause can be squared with the due-process concerns articulated in *Good. United States v. 194 Quaker Farms Rd.*, 85 F.3d 985, 990-91 (2d Cir. 1996).

The holdings below deprived Mrs. Collado of her property without any evidence that she had any involvement in criminal activity or any actual knowledge that the property was being used to facilitate drug activity. The Government presented no evidence that Mrs. Collado ever observed or was present at any drug transaction, that she ever saw any drugs or drug paraphernalia at the property, or that she was even aware of their presence. The Government's own search of the property for narcotics came up empty-handed. To deprive Mrs. Collado of her property in these circumstances without benefit of a hearing at which both the Government's claims and her statutory defenses could be assessed by the fact-finder was a denial of her right to procedural due process under the Fifth Amendment.

At the very least, the Due Process Clause of the Fifth Amendment requires that Mrs. Collado be given a full and fair opportunity to present evidence of her innocent ownership. Without an evidentiary hearing, the danger of an erroneous deprivation of property makes this disparate burden of proof even more constitutionally suspect. Even in *Parcel of Property*, the claimant got more process than Mrs. Collado. The claimant received a full jury trial on whether his

properties were subject to forfeiture, even though he was guilty of all criminal charges and ran a narcotics organization that he himself described as "factory sized." *See United States v. 2030-32 Main St.*, Nos. 5:90-CV-544 (EBB), 5:90-CV-545 (EBB), 5:90-CV-546 (EBB), 2000 WL 620424 (D. Conn. April 3, 2000); *Parcel of Property*, 337 F.3d at 227.

CONCLUSION

For all the foregoing reasons, petitioner respectfully submits that the significant questions presented relating to the proper statutory construction and constitutional viability of 21 U.S.C. § 881(a)(7) warrant the Supreme Court's review.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED NOVEMBER 6, 2003

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: October 23, 2003 Decided: November 6, 2003)

Docket No. 03-6074

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SOFIA COLLADO,

Claimant-Appellant,

PNC BANK, AS SUCCESSOR IN INTEREST TO MIDATLANTIC BANK NA, RAFAEL COLLADO,

Claimants,

REAL PROPERTY AND PREMISES KNOWN AS 464 MYRTLE AVENUE AND 181 WASHINGTON AVENUE, BROOKLYN NEW YORK, A 1995 TOYOTA LAND CRUISER, NEW YORK LICENSE PLATE NUMBER K560GF, VIN # JT3DJ81W3S0108524, UNITED STATES CURRENCY, IN THE AMOUNT OF $8,686.00, MORE OR

Appendix A

LESS, SEIZED AT 464 MYRTLE AVENUE, AND 181 WASHINGTON AVENUE, BROOKLYN, NEW YORK ON JUNE 3, 1998, UNITED STATES CURRENCY IN THE AMOUNT OF $19,266.00, MORE OR LESS, SEIZED AT 464 MYRTLE AVENUE AND 181 WASHINGTON AVENUE, BROOKLYN, NEW YORK ON JUNE 3, 1998, UNITED STATES CURRENCY, IN THE AMOUNT OF $8,909.05, MORE OR LESS SEIZED AT 295 WASHINGTON AVENUE, APARTMENT 4D, BROOKLYN, NEW YORK ON JUNE 3, 1998, UNITED STATES CURRENCY, IN THE AMOUNT OF $5,000.00 MORE OR LESS, SEIZED ON JUNE 3, 1998 FROM SAFETY ON JUNE 3, 1998 FROM SAFETY DEPOSIT BOX NUMBER 631 MAINTAINED IN THE NAME OF ANA OLGA COLLADO AT CITIBANK, 430 MYRTLE AVENUE, BROOKLYN, NEW YORK, ALL FUNDS ON DEPOSIT IN CHASE MANHATTAN BANK ACCOUNT NUMBER 819-6021835-01 IN THE NAME OF ANGELO LORENZO, ALL FUNDS ON DEPOSIT, IN CHASE MANHATTAN BANK ACCOUNT NUMBER 053-0674666-65 IN THE NAME OF ANA O. COLLADO AND RAFAEL R. COLLADO, ALL FUNDS ON DEPOSIT, IN CHASE MANHATTAN BANK ACCOUNT NUMBER 053-0674666-01 IN THE NAME OF ANA O. COLLADO AND RAFAEL R. COLLADO, AND ALL PROCEEDS TRACEABLE THERETO,

Defendants.

Appendix A

Before:

VAN GRAAFEILAND, B.D. PARKER, JR., *Circuit Judges*, BERMAN,[1] *District Judge.*

PER CURIAM.

Sofia Collado appeals from a decision of the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*) granting summary judgment to the United States in a civil forfeiture proceeding brought pursuant to 18 U.S.C. § 881(a)(7). Collado was required to forfeit a building she owned because it was used to facilitate the distribution of controlled substances in violation of 21 U.S.C. § 841 and maintained for the use of narcotics distribution in violation of 21 U.S.C. § 856(a)(2). For the reasons that follow, we affirm.

BACKGROUND

In 1983, Sofia Collado and her deceased husband, Ralph Collado, purchased a three-story building in Brooklyn, New York. The first floor of the building was occupied by a grocery store that Collado operated, while the second and third floors of the building were used as residential apartments.

In March 1997, law enforcement authorities initiated a fifteen month-long investigation, which included extensive

1. The Honorable Richard M. Berman, United Staes District Court for the Southern District of New York, sitting by designation.

intercepted telephone conversations, into a large-scale narcotics trafficking operation run by Sofia Collado's son, Ralph Collado, Jr., and his associates. The operation was based at Sofia Collado's building, where her son worked with his mother in the grocery store and resided with his girlfriend in the second floor apartment. Over the course of the investigation, law enforcement authorities amassed significant evidence of Ralph Collado, Jr.'s narcotics trafficking activities. He was subsequently arrested, and in October 1999, he was convicted on narcotics charges.

The United States subsequently brought a civil forfeiture action against Sofia Collado's property. *See* 18 U.S.C. § 881(a)(7); 21 U.S.C. § 841; and 21 U.S.C. § 856(a)(2). Sofia Collado opposed the forfeiture, essentially asserting that she was unaware that her property had been used for illegal purposes. The United States moved for summary judgment. Its theory was that the scale of narcotics trafficking around the store was so large that, assuming she had not acquired actual knowledge, she had willfully blinded herself to the narcotics activities on her property. *See United States v. 755 Forest Road,* 985 F.2d 70, 72 (2d Cir. 1993) (holding that willful blindness will not avoid forfeiture).

The government's evidence showed that approximately $20 million of narcotics transactions took place in and around Collado's building between June 1997 and June 1998, and that 646 narcotics-related transactions were conducted on a telephone located in her grocery store between December 1997 and March 1998. The government also identified a series of narcotics-related events that Collado "more likely than not saw or overheard." These events generally involved

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Collado's son selling or buying drugs in the vicinity of the building or negotiating drug deals over the grocery store telephone. For example, on one occasion, Collado's son exited the store and sold one ounce of heroin to an undercover officer in a parked vehicle. On another occasion, Collado's son gave four pounds of marijuana to a woman after she approached him in the store and followed him outside. On a third occasion, Collado's son arranged to sell cocaine to a buyer over the store phone using coded terms. In addition, a search of Collado's building executed pursuant to a warrant uncovered nearly $20,000 in cash and an Ohaus scale commonly used for weighing drugs in the second-floor apartment belonging to Collado's son, as well as a .357 magnum handgun and $8,686 in the grocery store itself.

The government further presented transcripts of several phone conversations involving Collado in which she warned her son's associates against speaking on the phone. During one conversation, she told a caller who was looking for her son: "You want to report to talk with Ralphy, good. Report here to talk. I don't want blah blah over the phone, and nothing from nothing. You guys know that its something serious. . . . I'm going to put him on but without talking of anything. Because the thing is hot." She told another caller that her son "will call you in a little while, because on this phone I don't want the talk for nothing." At the same time, her son could be heard shouting in the background, "I'll call you on your cell phone man!" and "It's here baby." On yet another occasion, Collado warned a caller asking for her son to "be very, very careful talking over the phone."

Collado also made a number of admissions establishing her state of mind. She admitted that she knew about her son's prior conviction for narcotics trafficking and that he had been released from incarceration on those charges only four years earlier. More importantly, she straightforwardly admitted her suspicions regarding her son's narcotics activities: "I had my suspicions, because of his associates from the jail calling and stopping by frequently."

In response to the government's evidence, Collado contended that she had not witnessed any drug transactions directly, and that her son and his associates endeavored to conduct such transactions outside of her store and outside of her presence. Moreover, she claimed that she had little knowledge of English, much less coded phrases for narcotics, and that most of her son's phone conversations involving drugs were conducted in English. She also asserted that her generalized suspicions about her son's involvement with drugs did not extend to any specific knowledge that he might be using her property for illegal purposes. Lastly, Collado argued that the government misconstrued the meaning of her statements on the phone by using literal rather than idiomatic translations.

On the basis of this evidence against Collado, the district court rejected her claim that she had not remained willfully blind to large-scale narcotics trafficking on her property. The district court also rejected her argument that the forfeiture of her property constituted an excessive fine in violation of the Excessive Fines Clause of the Eighth Amendment. Collado appeals and we affirm.

Appendix A

DISCUSSION

We review a district court's grant of summary judgment *de novo*. *See Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 763 (2d Cir. 2002); *First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 165 (2d Cir. 1998); *Westport Bank & Trust Co. v. Geraghty*, 90 F.3d 661, 668 (2d Cir. 1996).

On appeal, Collado raises several issues. Her first argument is that the district court improperly applied a "preponderance of the evidence" standard to conclude that she had been willfully blind to narcotics activities on her property. She asserts that under the more stringent standard for granting summary judgment, the government's evidence was insufficient.

In 1998, when the events at issue occurred, civil forfeiture was governed by an earlier version of 21 U.S.C. § 881(a)(7). Although Congress later amended the civil forfeiture laws by passing the Civil Asset Forfeiture Reform Act of 2000, Pub. L. 106-185 (2000) ("CAFRA"), CAFRA does not apply to actions filed before its effective date. *See id.* § 21; *United States v. $557,933.89*, 287 F.3d 66, 76 n.5 (2d Cir. 2002). Accordingly, pre-CAFRA requirements control. We note that under the pre-amendment version of 21 U.S.C § 881(a)(7), the government bears the initial burden of establishing probable cause "to believe that the property [is] subject to forfeiture." *United States v. 15 Black Ledge Drive*, 897 F.2d 97, 102 (2d Cir. 1990). Once probable cause has been established, the burden then falls more heavily upon the claimant to prove "by a preponderance of the evidence" that "the illegal use of

the property was without his knowledge or consent." *United States v. 19 and 25 Castle Street,* 31 F.3d 35, 39 (2d Cir. 1994). We have construed the "knowledge" prong broadly such that "where an owner has engaged in 'willful blindness' as to the activities occurring on her property, her ignorance will not entitle her to avoid forfeiture." *755 Forest Road,* 985 F.2d at 72.

Had this case gone to trial, the burden-shifting framework undergirding civil forfeiture actions would have required Collado to prove by a preponderance of the evidence that she was not aware of, or not willfully blind to, the narcotics activities at her building. This case, however, did not go to trial, but was adjudicated by summary judgment, pursuant to which the moving party bears the burden of proving that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The evidentiary standard that must be met by the moving party is a high one, since a court is obliged "to draw all inferences in favor of the party against whom summary judgment is sought," *Ramseur v. Chase Manhattan Bank,* 865 F.2d 460, 465 (2d Cir. 1989), and to "construe the evidence in the light most favorable to the nonmoving party," *United States v. All Funds Distributed to Weiss,* 2003 U.S. App. LEXIS 19279 *8 (2d Cir. 2003).

The district court below appears to have predicated its ruling regarding Collado's willful blindness, in part, upon its finding that she had "more likely than not" witnessed certain narcotics-related events in and around her store. To the extent that this was the case, we disagree with the district court's analysis. The district court was required by Rule 56 to draw all inferences in Collado's favor and to

construe the evidence in the light most favorable to her. Instead, it seems to have applied a lesser "preponderance of the evidence" standard in granting the government's motion.

We may affirm, however, so long as there is sufficient evidence in the record to support the result reached by the district court below. *See United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) ("We are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied.") (internal quotation marks omitted). Accordingly, we conclude that the district court's approach does not require reversal since the uncontested evidence against Collado was sufficient to support summary judgment. Collado conceded that $20 million worth of narcotics transactions occurred in or around her store over a one year period, and that 646 narcotics-related conversations were held on her grocery store phone over a three month period. She admitted that she knew of her son's history with narcotics trafficking. Critically, she further admitted her suspicions that he "may have been getting involved with drugs again because his associates from the jail and people with bad reputations in the neighborhood were calling him on the Grocery Store Phone and visiting him at the Grocery Store more frequently than I thought they would if their calls and visits were just about friendship." Moreover, although Collado claims that her statements warning her son's associates against speaking on the phone were misconstrued by the government, her claim is undermined by the undisputed fact that she instructed one associate to come and speak to her son in person, and that she told another associate that her son would call him back on his cell phone. In light of the uncontested evidence against

Collado, we conclude that her generalized assertions of ignorance were insufficient to create material issues of fact as to whether she was willfully blind to narcotics activity in her building. Consequently, summary judgment for the government was proper.

Collado's next argument is that her Fifth Amendment due process rights were violated when the district court allowed her property to be forfeited upon a mere showing of probable cause. This argument fails. First, as Collado concedes, this issue was not raised below in the district court. The general rule in our circuit is that "a federal appellate court does not consider an issue not passed upon below." *Robinson v. Government of Malaysia,* 269 F.3d 133, 147 (2d Cir. 2001). In any event, we recently resolved this issue dispositively in *United States v. Parcel of Property,* 337 F.3d 225 (2d Cir. 2003). In reviewing a due process challenge to the civil forfeiture procedures in effect prior to the enactment of CAFRA, we held "that the pre-CAFRA burdens of proof do not violate due process." *Id.* at 233.

Collado's final argument is that the forfeiture of her property constituted an excessive fine in violation of the Eighth Amendment. The district court found that the forfeiture was not excessive—or grossly disproportional to the gravity of the offense—under the test articulated by the Supreme Court in *United States v. Bajakajian,* 524 U.S. 321, 334 (1998). *Bajakajian* held that a forfeiture is unconstitutionally excessive if it is "grossly disproportional to the gravity of a defendant's offense." *Bajakajian,* 524 U.S. at 324. Among the factors that the Court considered were: (a) "the essence of the crime" of the respondent and its

relation to other criminal activity, (b) whether the respondent fit into the class of persons for whom the statute was principally designed, (c) the maximum sentence and fine that could have been imposed, and (d) the nature of the harm caused by the respondent's conduct. *See id.* at 337-39. Under this test, forfeiture of Collado's property was not an "excessive fine" because her conduct constituted a violation of 21 U.S.C. § 856(a)(2), which makes it illegal for a person to "manage or control any building . . . as an owner . . . and knowingly and intentionally . . . make available for use . . . the building . . . for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." As the district court noted, a violation of this statute would have a direct relation to the extensive drug trafficking on her property, Collado would fit within the class for which the statute was designed, the potential statutory fine would exceed the value of the forfeited property, and the harm to the public arising from her willful blindness was substantial. The district court's Excessive Fines analysis was not improper.

We have considered Appellant's other contentions and find them to be without merit.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 19, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98-CV-3948 (ILG)

UNITED STATES OF AMERICA,

Plaintiff,

v.

REAL PROPERTY AND PREMISES KNOWN as 464 MYRTLE AVENUE and 181 WASHINGTON AVENUE, BROOKLYN, NEW YORK,

Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

Plaintiff United States of America (the "government") moves for summary judgment on its civil forfeiture claim pursuant to 21 U.S.C. § 881 regarding the real property located at 464 Myrtle Avenue and 181 Washington Avenue in Brooklyn, New York (the "defendant property"). Claimant and owner of the defendant property Sofia Collado opposes the forfeiture on the grounds that she is an innocent owner and that the proposed forfeiture would be unconstitutional

under the Excessive Fines Clause. The undisputed evidence establishes that the defendant property is subject to forfeiture. Further, as explained below, even if Mrs. Collado's denial of actual knowledge of her son's criminal activity is credited, her admissions that she had suspicions and the actions she took on those suspicions show that at best she willfully blinded and consciously avoided that which was otherwise painfully apparent to her. Summary judgment is awarded to the government.

BACKGROUND

Mrs. Collado is the title owner of the defendant property. (Rule 56.1 Statement, ¶ 1.) Mrs. Collado was born in the Dominican Republic on September 6, 1939, and moved to the United States more than thirty years ago. (Collado Aff. ¶ 4.) Mrs. Collado and her husband Rafael Collado Sr. purchased the defendant property on March 16, 1983. (*Id.*, ¶ 2.) Mr. Collado died during the pendency of this action, and his interest in the property passed to Mrs. Collado. (*Id.*, ¶ 2.) The property includes a three story building with one residential apartment on each of the second and third floors, which are accessible through a common entrance at 181 Washington Avenue (the "apartment entrance"). (O'Neill Dec., ¶ 4.) The first floor is occupied by a grocery store called Collado and Son the entrance to which faces Myrtle Avenue at 464 Myrtle Avenue (the "grocery store entrance"). (*Id.*) Mr. and Mrs. Collado owned and operated the grocery store. (*Id.*) Mrs. Collado did not live at the defendant property, but at the relevant times, her son Rafael Collado Jr. and his girlfriend Angela Lorenzo lived in the second floor apartment on the defendant property. (O'Neill Dec. ¶ 4.) The fair market

value of the defendant property is $385,000. (*See* Rule 56.1 Statement ¶ 31; Gay Dec., ¶ 3.)

The Undisputed Evidence of Narcotics Trafficking on and around the Defendant Property

The government does not claim that Mrs. Collado actually observed any of the events that occurred outside of the grocery store. Even excluding the events that occurred wholly in the vicinity of the apartment entrance (and therefore were likely invisible to Mrs. Collado since she could only see what transpired in the store and just outside its entrance), the government can point to eleven events over the course of one year that Mrs. Collado more likely than not saw or overheard.

On June 13, 1997, Rafael Collado Jr. exited the grocery store and entered a vehicle parked outside in which he sold one ounce of heroin to an undercover officer in exchange for three hundred dollars. (Rule 56.1 Statement, ¶ ¶ 2-3; O'Neill Dec. ¶ 8.)

On July 11, 1997, an associate and fellow employee of Rafael Collado Jr., Hector Sanchez, met an undercover officer in the grocery store. (*Id.*, ¶ 6.) They went outside where Sanchez sold thirty grams of heroin to the undercover officer for three thousand dollars. (*Id.*)

On January 2, 1998, Rafael Collado Jr. spoke by telephone from the grocery store with David Rodriguez and ordered two kilograms of cocaine for a price of thirty seven

thousand dollars using coded terms.[1] (*Id.*, ¶ 8.) Shortly thereafter, Rodriguez entered the defendant property carrying a black shoulder bag but left without it, using the apartment entrance both times. (*Id.*, ¶ 9-10; *see* O'Neill Dec. ¶ 10.) Later that night, or rather in the early hours of the morning of January 3, Rafael Collado Jr. spoke by telephone from the grocery store to Angela Lorenzo who was in the apartment on the second floor, and told her to give "the two presents"

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1. In relevant part, the government's translation of the transcription of that phone call reads:

Rafael Collado Jr.:	Listen to me. You know what you gave me before . . . Can you bring it to me now. . . .
Rodriguez:	How many?
Rafael Collado Jr.:	What you gave me before!
Rodriguez:	Two.
Rafael Collado Jr.:	Yea
	* * *
Rafael Collado Jr.:	. . . You can bring it to me now and . . .
Rodriguez:	Yeah . . . ah . . . 18 . . . 18500 00 00
	* * *
Rafael Collado Jr.:	Cause she. She. She is one two on a shot you know what I am saying.

(Gov't Ex. 8, at 1.) According to Sergeant O'Neill, who oversaw the investigation that led to the arrests, the term "she" is a common street term for cocaine, and $18,500 was a common price for a kilogram of cocaine at the time of the conversation. (O'Neill Dec. ¶ 12.)

to "Louie." (*Id.*, ¶ 11.) Not long thereafter, Lorenzo distributed two kilograms of heroin to Louis Morales. (*Id.*, ¶ 12.)

On January 4, 1998, Rafael Collado Jr. spoke by telephone from the grocery store to an unidentified person and asked if "you bringing me some loot from that little boy?" (*Id.*, ¶ 13-14.) According to Sergeant O'Neill, "little boy" is a street term for heroin. (O'Neill Dec. ¶ 18.)

On January 7, 1998, Rafael Collado Jr. spoke by telephone from the grocery store and offered, by using coded phrases, to sell another person cocaine for the price of $18,500 per kilogram. (*Id.*, ¶ 15.) Specifically, they referred to cocaine by using the term "women", a street term for cocaine, and negotiated the price by asking "Where are they gonna live" to which Rafael Collado Jr. responded, "oh . . . eighteen and a half." (O'Neill Dec. ¶ 20, Gov't Ex. 11, at 1.)

On January 25, 1998, Reginald Velez spoke by telephone to Rafael Collado Jr., who was at the grocery store. Velez said that he had shot another person believed to have stolen drugs from Rafael Collado Jr., and that Velez had recovered some drugs and given them to his brother for resale. (*Id.*, ¶ 16- 17.)

On February 18, 1998, Velez again spoke by telephone with Rafael Collado Jr., who was at the grocery store. Velez asked Rafael Collado Jr. if he was interested in selling heroin to a customer. (*Id.*, ¶ 21.)

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On February 19, 1998, an unidentified woman entered the grocery store and approached Rafael Collado Jr., who exited the grocery store with her and spoke briefly. (*Id.*, ¶ 22; O'Neill Dec. ¶ 39.) Rafael Collado Jr. then entered through the apartment entrance and returned shortly thereafter with a paper bag that contained four pounds of marijuana, which he gave to her outside of the apartment entrance.

Mrs. Collado thus observed her son or his friend Sanchez leaving the store with people coming to the grocery store looking for them on three occasions, and otherwise overheard her son speaking on the phone using common words like "she," "women," "two presents," and "little boy." The government does not dispute Mrs. Collado's sworn statement that she did not understand that those terms were coded references to cocaine and heroin. (*See* Collado Aff. ¶ ¶ 21, 23, 25-31.)

Finally, on June 3, 1998, Police officers executed a search warrant of the defendant property and found in the grocery store a .357 magnum handgun and $8,686 in cash kept in a tool box. (Rule 56.1 Statement, ¶ 25.) The police also discovered in the second-floor apartment belonging to Rafael Collado Jr. and his girlfriend Angela Lorenzo an Ohaus scale (typically used by drug traffickers to weigh narcotics) and almost $20,000 in cash secreted around the apartment. (*Id.*; O'Neill Dec. ¶ 48.)

Mrs. Collado does not deny knowing about the cash or the handgun, but she claims that the cash on hand was to pay beer distributors who serviced their grocery store, some of whom demanded payment in cash only. (Collado Dep. at 39.)

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One invoice from a beer distributor clearly indicates that only cash was accepted for payment, but the other invoices on their face do not restrict payments to cash. (Wilentz Aff., Ex. H.) No narcotics were found anywhere in the building.

Statements by or to Mrs. Collado

There is no dispute over the fact that on five occasions, Mrs. Collado received phone calls and made certain inculpatory statements as described below.

On January 26, 1998, a person named "Vejin" called and asked to speak to Rafael Collado Jr. According to the government's translation, Mrs. Collado told the caller:

> Look, sir. Boss of intrusion. You want to report to talk with Ralphy, good. Report here to talk. I don't want blah blah over the phone and nothing from nothing. You guys know that its something serious. You guys know what I am trying to say. I want to talk personally to all. To all I am giving advice. . . . But you I give it more like this. It's that I'm going to put him on but without talking of anything. Because the thing is hot. . . . Okay that's all I'll say because now I don't want more phone calls at my business.

(Gov't Ex. 13, at 1).

Four days later, on January 30, 1998, an unidentified male called and asked to speak to Rafael Collado Jr. Mrs. Collado warned the caller to "be very, very careful talking over the phone." (Rule 56 .1 Statement ¶ 19; Gov't Ex. 14, at 1.)

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On February 10, 1998, an unidentified male called and asked to speak to her son. Mrs. Collado lied and told the caller that he was not around and that "he will call you in a little while because on this telephone I don't want to talk for nothing." (Rule 56.1 Statement ¶ 20; Gov't Ex. 15, at 1.) In fact, Rafael Collado Jr. was present in the store. (Gov't Ex. 15, at 1.)

Mrs. Collado explains these statement by arguing that she did not like people calling her son at work, and that she sought to scare off his associates by demanding that if they wanted to speak with her son in the future they would need to do so in her presence and not on the phone. (Collado Mem. at 15-16.) For example, Mrs. Collado claims that when she said "You guys know that its something serious. You guys know what I am trying to say. I want to talk personally to all. To all I am giving advice," this was her attempt to "scare them so they would stop calling." (Collado Aff. ¶ 13.) Similarly, Mrs. Collado states that she lied to one caller because she did not want the caller to be speaking with her son. (*Id.*) On the other hand, Mrs. Collado admits that she sought to scare off her son's associates because, although she did not know that her "son was selling drugs again," she "had [her] suspicions, because of his associates from the jail calling and stopping by frequently. . . ." (*Id.*, ¶ 3.)

The government also points to two other events. On February 28, 1998, Mrs. Collado called Angela Lorenzo (who lived on the second floor of the defendant property) from the grocery store to ask her to track down her son because a woman had stopped by the store looking for him. (Rule 56.1 Statement, ¶ 23.) Mrs. Collado believed that this

woman was bringing him some money. (*Id.*) Mrs. Collado states that her belief was based on the claim of the woman (who lived in the neighborhood) that she sought to repay a loan her son made. (Collado Aff. ¶ 14.)

Finally, on March 19, 1998, Mrs. Collado's husband called her to tell her (a) not to use the telephone "because they are catching people on the phones and those who are caught, get five (5) to ten (10)"; (b) "they caught a group over there"; (c) "they say the losses . . . I don't know how many millions"; and (d) "it's the FBI that's behind all this." (Rule 56.1 Statement, ¶ 24.) Mrs. Collado states that this phone call had nothing to do with her son or any suspicions about wiretapping, and instead involved her husband warning her away from dealing with people offering certain phone numbers that purportedly allowed people to call the Dominican Republic for free. (Collado Aff. ¶ 15.)

DISCUSSION

I. Standard for Summary Judgment

Summary judgment "shall be rendered forthwith if the pleadings, depositions . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "moving party is entitled to judgment as a matter of law [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985) (internal quotation marks and citations omitted). In deciding

a summary judgment motion, a court should not resolve disputed issues of fact; rather, it simply must decide whether there is any genuine issue to be tried. *Eastman Mach. Co. v. United States*, 841 F.2d 469, 473 (2d Cir. 1988). A disputed fact is material only if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a reasonable jury could return a verdict in her favor. *Id.*, at 248-49. The motion "will not be defeated merely . . . on the basis of conjecture or surmise." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991). "In assessing the record to determine whether there is a genuine issue of fact, the court is required to draw all inferences in favor of the party against whom summary judgment is sought." *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989).

II. The Government Has Established Probable Cause for Forfeiture

The government's basis for seizure of real property used to facilitate violations of the federal drug trafficking laws is limited by statute to exclude property interests "to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of the owner." 21 U.S.C. § 881(a)(7) (1999). To support a forfeiture pursuant to 18 U.S.C. § 881, the government need only establish probable cause, or "reasonable grounds, rising above the level of mere suspicion, to believe that the property is subject to forfeiture." *United States v. 15 Black Ledge Drive*, 897 F.2d 97, 102 (2d Cir. 1990). Although the Civil Asset Forfeiture Reform

Act of 2000 (CAFRA), *see* Pub. L. 106-185 (2000), imposed a higher standard of proof upon the government, CAFRA does not apply retroactively to actions filed before its effective date such as this one. *Id.*, § 21; *see United States v. $557,933.89*, 287 F.3d 66, 76 n.5 (2d Cir. 2002). Accordingly, the government needs only to show probable cause.

Mrs. Collado does not contest that the government has met its burden to establish probable cause "to believe that certain property is subject to forfeiture." *United States v. 4492 Livonia Rd.*, 889 F.2d 1258, 1267 (2d Cir. 1989). In any event, as detailed above, the government has more than met its burden and presented facts that establish probable cause to believe that the defendant property was used to facilitate both the distribution of narcotics such as cocaine and heroin contrary to 21 U.S.C. § 841 and also the maintenance of property for the use of narcotics distribution contrary to 21 U.S.C. § 856(a)(2).

III. The Innocent Owner Defense

Once probable cause is established, the burden shifts to Mrs. Collado to establish that she is an innocent owner. *4492 Livonia Rd.*, 889 F.2d at 1267. In order to establish the "innocent owner" affirmative defense, Mrs. Collado "must prove by a preponderance of the evidence that . . . the illegal use of the property was without [her] knowledge or consent." *United States v.. 19 and 25 Castle Street*, 31 F.3d 35, 39 (2d Cir. 1994). At the summary judgment stage, normally "caution must be exercised in granting summary judgment where state of mind is at issue." *Bryant*, 923 F.2d at 985. However, "when the government supplies facts which give

rise to a reasonable inference that the claimant was aware of narcotics activity, the claimant opposing summary judgment bears a correspondingly greater burden to come forward with evidence which meets that inference." *United States v. 8848 South Commercial Street*, 757 F. Supp. 871, 881 (N.D. Ill. 1990). Evidence that drug trafficking was occurring but that the claimant chose to ignore it is sufficient to give rise to the inference that she was aware of it. *United States v. 755 Forest Road*, 985 F.2d 70, 72 (2d Cir. 1993) ("where an owner has engaged in 'willful blindness' as to activities occurring on her property, her ignorance will not entitle her to avoid forfeiture"). If a claimant has knowledge or remained willfully blind to the narcotics trafficking, then to avoid forfeiture the claimant must "take all reasonable steps to prevent illicit use of premises once [she] acquires knowledge of that use. . . ." *United States v. 141st Street Corp.*, 911 F.2d 870, 879 (2d Cir. 1990).

In this case, setting aside the evidence of drug trafficking that only occurred via the apartment entrance (and therefore wholly out of sight of Mrs. Collado working in the grocery store), the undisputed evidence shows (i) buyers walking into the grocery store and then following Rafael Collado Jr. or one of his accomplices out of the building to conduct their drug transactions, (ii) Rafael Collado Jr. placing and receiving numerous phone calls at the grocery store to conduct narcotics-related business, and (iii) Mrs. Collado herself speaking to associates of her son and warning them not to use the grocery store phone and to speak to her son in person.

Further, although Mrs. Collado denies knowing that "my son was selling drugs again," (Collado Aff., ¶ 3), she candidly

admits, "I had my suspicions, because of his associates from the jail calling and stopping by frequently." (*Id.*) She further admitted that her suspicions were strong enough to act upon by telling his associates to stop calling her son on the phone in the grocery store "in order to protect my son and to protect my Grocery Store." (*Id.*) In response to this admission, the government argues that Mrs. Collado's admissions that she had suspicions about her son means that at the very least she chose to remain "willfully blind." (Gov't Reply Mem. at 9-12.) In order to find that someone acted with willful blindness, the evidence must show that she "was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Pascarella*, 84 F.3d 61, 70 (2d Cir. 1996) (quotations omitted). Despite the able efforts of her counsel to finesse the distinction between her suspicion and her actual knowledge, it is undisputed that Mrs. Collado was at least aware of facts from which a reasonable person would infer a high probability that illicit activity was taking place.

Mrs. Collado's suspicions therefore imposed upon her the duty to "take all reasonable steps" to prevent illicit use of the property. *141 Street Corp.*, 911 F.2d at 879. However, rather than "ask[ing] the police to take some action in regard to the narcotics activity at their dwelling," *19 and 25 Castle Street, 31 F.3d at 40*, or issuing an ultimatum to her son to stay away from these associates, *id.*, the undisputed evidence shows that Mrs. Collado in fact invited these persons she assumed to be her son's jail associates to come to the defendant property and indeed to the grocery store itself if they wanted to speak to him. For example, in that same phone call where she meant to say "things are not good," she

explicitly told this associate: "*You want to report to talk with Ralphy, good. Report here to talk.*" She further said, "I don't want more phone calls at my business." Mrs. Collado told another associate, "he will call you in a little while because on this telephone I don't want to talk for nothing," and told a third associate, "be very, very careful talking over the phone." Although these statements may have discouraged her son and his associates from using the grocery store phone to conduct their business, to argue that encouraging Rafael Collado Jr.'s associates to come to the defendant property to meet with him was a reasonable step in reaction to her suspicions is not persuasive.

Since both sides dispute whether Mrs. Collado's statements on the phone show that she knew or suspected the presence of a wiretap, the issue merits brief mention. The government argues that these phone conversations are proof that Mrs. Collado knew that illicit activity was going on, and was warning her son's associates that the phone might be tapped and to speak in person only. (Gov't Mem. at 8, 22-23.) In contrast, Mrs. Collado denies any knowledge of the wiretaps or her son's activities until after the arrests in June 1998, and argues that her statements are being misconstrued. (Collado Aff. ¶ 10.)[2] For example, she states that the phrase

2. If Mrs. Collado suspected that the phone was being wiretapped, it seems highly unlikely that the actual participants in the trafficking would not also suspect wiretapping. Yet the evidence supplied by the government indicates that Rafael Collado Jr. and his associates continued to discuss violent crimes and drug-related business while talking on the phone. *See, e.g.*, Gov't Ex. 12 at 1 (discussing "the dude I shot over there," "I ended shooting the *moreno* in the leg," and "this other *moreno*'s drugs, right and the dude that I shot he tried to set them up.").

Appendix B

"*la cosa esta caliente*" used in the January 26 phone call literally translates as "*the thing is hot*" but idiomatically means that "*things are not good.*" (*Id.*) In other words, Mrs. Collado claims that the phrase does not mean that she had any knowledge of the wiretap, but rather that she did not like the idea of the caller speaking to her son. Similarly, Mrs. Collado claims that her husband's warning in the March 19 phone call had nothing to do with narcotics investigations or wiretaps, but instead referred to an occasion earlier when someone came to the grocery store offering fraudulent phone numbers that allowed a person to phone the Dominican Republic without being charged. (*Id.*, ¶ 15.) The phrase "catching people on the phones" and "they caught a group over there" referred to arrests of people in the Dominican Republic who were administering the fraudulent scheme, and the reference to "millions" meant the losses suffered by the phone company. (*Id.*)

If the only evidence that tended to show Mrs. Collado knew or suspected that her son was involved in illegal activity were these references to using the phones, then the dispute over the proper translation of her expressions in a foreign language might preclude summary judgment. *See Buxbaum v. Deutsche Bank AG*, 196 F. Supp. 2d 367, 373 (S.D.N.Y. 2002). Given her admitted suspicions, however, this dispute is not material. If Mrs. Collado is correct, then her statements confirm that she was very worried that her son and his associates might be engaged in criminal activity. If the government is correct, then this evidence would be further proof of her knowledge. The existence of a dispute over translation or interpretation in this case does not create a genuine issue of a material fact, and therefore cannot preclude summary judgment.

Appendix B

IV. The Excessive Fines Clause

Mrs. Collado argues that forfeiture of the defendant property would be an excessive fine prohibited by the Constitution. The Bill of Rights provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted ." U.S. Const., Amend. 8. This protection is applicable to forfeitures sought under 21 U.S.C. § 881(a)(7), because even though they are termed "civil forfeitures" they are punitive in fact. *See Austin v. United States*, 509 U.S. 602, 621-22 (1993). "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). In order to determine whether a forfeiture is "grossly disproportionate," the amount of the forfeiture is compared to the gravity of a claimant's conduct. *Id.* at 336-37. In *Bajakajian*, the government sought to forfeit the entire amount of currency ($357,144) that the defendant carried as he left the country but failed to report. *Id.* at 325. The Court found this forfeiture was grossly disproportionate after examining a number of factors, including: (a) "the essence of respondent's crime" and its relation to other criminal activity, (b) whether the respondent fit into the class of persons for whom the statute was principally designed, (c) the maximum sentence and fine that could have been imposed, and (d) the nature of the harm caused by the claimant's conduct. *Id.* at 337-39.

In this case, the government claims that Mrs. Collado violated 21 U.S.C. § 856(a)(2) by deliberately ignoring Rafael Collado Jr.'s actions and making the defendant property available for drug distribution. *See United States v. Chen*, 913 F.2d 183, 191 (5th Cir. 1990) (holding that "deliberate ignorance" may support § 856(a)(2) claim); *United States v. Bilis*, 170 F.3d 88,

92-93 (1st Cir. 1999) (holding "willful blindness" instruction appropriate in § 856(a)(2) charge); *see also United States v. 143-147 E.23rd*, 888 F. Supp. 580, 585 (S.D.N.Y. 1995) (noting that a "colorable criminal case" existed against hotel owner claimant contesting forfeiture of SRO hotel under § 856(a)(2)), *aff'd*, 77 F.3d 648 (2d Cir. 1996). In other words, as Mrs. Collado essentially conceded at oral argument (Tr. at 27), the Excessive Fines analysis in this case collapses into the determination of her innocent owner defense.

The evidence regarding her innocent owner defense similarly establishes the § 856(a)(2) violation. Given her suspicions, only by remaining willfully blind to what her son and his associates were in fact doing in and around the defendant property could Mrs. Collado deny knowledge of the drug trafficking. All of the *Bajakajian* factors are satisfied here.[3]

3. Prior to *Bajakajian*, the Second Circuit Court of Appeals outlined what factors should be considered to determine whether a forfeiture violates the Excessive Fines Clause:

> (1) the harshness of the forfeiture (*e.g.*, the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.

United States v. Milbrand, 58 F.3d 841, 847-48 (2d Cir. 1995). The Second Circuit has not revisited this test since *Bajakajian*

(Cont'd)

The § 856(a)(2) violation would have a high degree of relation to the other criminal activity (namely the extensive drug trafficking), Mrs. Collado would fit within the class for whom 21 U.S.C. § 881 was designed, the statutory fine allowed (up to $500,000 per claimant)[4] would be significantly in excess of the $385,000 value of the defendant property, and the harm to the public caused by the drug trafficking is great.

Accordingly, summary judgment is not precluded by the Excessive Fines defense.

CONCLUSION

For the foregoing reasons, the government's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is granted.

SO ORDERED.

Date: March 19th, 2003
Brooklyn, New York.

s/ I. Leo Glasser
I. Leo Glasser
United States District Judge

(Cont'd)
was decided, but either set of factors would produce the same result in this case.

4. Because the statutory fine in 21 U.S.C. § 856 exceeds $250,000, a sentencing court would have the discretion to impose a fine up to the statutory maximum. U.S.S.G. § 5E1.2(c)(4).